



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 14, 2004

Mr. Steve Aragón
Chief Counsel
Texas Health Human Services Commission
P. O. Box 13247
Austin, Texas 78711

OR2004-7833

Dear Mr. Aragón:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 209144.

The Health and Human Services Commission (the "commission") received a request for certain specified HMO Financial-Statistical Reports (FSRs) for the CHIP and STAR Medicaid Program. Although you take no position as to whether the requested information is excepted from disclosure, you state, and provide documentation showing, that you have notified twelve vendors whose information is at issue in this request of their opportunity to submit comments to this office.¹ See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have received correspondence from Seton and Superior. We have considered all of the submitted arguments and reviewed the information submitted by the commission. We have also

¹The twelve third parties you notified are: Community Health Choice; HMO Blue – Medicaid; Amerigroup, Inc.; Centene/Superior Health Plan ("Superior"); JPS/MetroWest Health Plan; Texas Children's Health Plan; Community First Health Plan; First Care Health Plan; Seton; the University of Texas Medical Branch; Driscoll; and Parkland Health First.

considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that any individual may submit comments stating why information should or should not be released).

Initially, we note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have only received correspondence from Seton and Superior. None of the remaining third parties has submitted comments to this office in response to the section 552.305 notice. Consequently, none of the remaining third parties has provided this office a basis to conclude that the responsive information is excepted from disclosure. *See, e.g.*, Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, the commission may not withhold any portion of the submitted information related to any of the remaining third parties on the basis of any proprietary interest these parties may have in the information.

Both Seton and Superior claim that the submitted information related to each entity is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated, based on specific factual evidence, that disclosure would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other

concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret, as well as the Restatement's list of six trade secret factors.² *Id.* This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for the exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). However, we can not conclude that section 552.110(a) applies unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. See Open Records Decision No. 402 (1983).

Section 552.110(b) of the Government Code excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. See Open Records Decision No. 661 at 5-6 (1999) (stating that business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm); see also *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

After reviewing Seton's and Superior's arguments and the submitted information, we find that both Seton and Superior have established a *prima facie* case that their information constitutes a trade secret under section 552.110(a). We have received no arguments that rebut Seton's or Superior's trade secret claims as a matter of law. Accordingly, we conclude

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

that the commission must withhold the information related to Seton and Superior under section 552.110(a) of the Government Code.³ The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

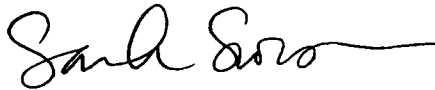
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

³Because we reach this conclusion, we need not address Seton's or Superior's arguments under section 552.110(b) of the Government Code.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/krl

Ref: ID# 209144

Enc. Submitted documents

c: Mr. Philip M. Desautel
2617 Tall Meadow Court
Bedford, Texas 76021
(w/o enclosures)

Community Health Choice
2636 South Loop, Suite 700
Houston, Texas 77054
(w/o enclosures)

HMO Blue-Medicaid
901 S. Central Expressway
Richardson, Texas 75080
(w/o enclosures)

Amerigroup, Inc.
2730 N. Stemmons Freeway, Ste. 608
Dallas, Texas 75207
(w/o enclosures)

Centene/Superior Health Plan
2100 South IH-35, Ste. 202
Austin, Texas 78704
(w/o enclosures)

JPS/MetroWest Health Plan
1617 Hemphill
Fort Worth, Texas 76104
(w/o enclosures)

Texas Children's Health Plan
1919 Braeswood
Houston, Texas 77230
(w/o enclosures)

Community First Health Plan
4801 NW Loop 410, Ste., 1000
San Antonio, Texas 78229
(w/o enclosures)

First Care Health Plan
12940 Research Boulevard
Austin, Texas 78750
(w/o enclosures)

Seton
305 East Huntland Drive, Ste. 200
Austin, Texas 78752
(w/o enclosures)

University of TX Medical Branch
2621 Featherwood Drive, Ste. 100
Houston, Texas 77034
(w/o enclosures)

Driscoll
P. O. Box 6609
Corpus Christie, Texas 78411
(w/o enclosures)

Parkland Health First
2777 N. Stemmons Freeway, Ste. 1750
Dallas, Texas 75207
(w/o enclosures)